

No. 13032

United States
Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,
d/b/a MACKIE & LEWIS,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

SEP 24 1951

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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ROSCOE KRIER,

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909 Smith Tower,
Seattle 4, Washington.

RUMMENS, GRIFFIN & SHORT,

Attorneys for Appellee,
1107 American Building,
Seattle 4, Washington.

United States District Court Western District of
Washington, Northern Division

No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS,
d/b/a Mackie & Lewis,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT

Comes now plaintiffs and for cause of action
against the defendant, complain and allege as fol-
lows:

I.

That plaintiffs, Paul D. Mackie and Joseph H. Lewis, at all times herein mentioned have been and now are residents of the State of Washington and co-partners doing business as Mackie & Lewis with their principal office and place of business in Seattle, Washington, within the jurisdiction of this court.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, engaged as a common carrier in the interstate transportation of freight and passengers for hire; that said defendant receives property for transportation from points within the State of Washington to points in other

States and maintains tracks and facilities within the jurisdiction of this court.

III.

That this court has jurisdiction of the parties and subject matter of this cause pursuant to part I of the Interstate Commerce Act as amended, 49 USCA, Section 1, et seq.; that defendant, as a common carrier, is subject to the provisions of 49 USCA, 20 (11) of said Act.

IV.

That on or about the 4th day of March, 1949, plaintiff by and through its agent, Tacoma Plywood Corporation, a corporation, delivered to defendant for shipment from Tacoma, Washington, to Phoenix, Arizona, one carload of Douglas Fir Plywood; that plaintiff thereupon became, and now is, the holder of the Bill of Lading therefor; that defendant accepted and received said property for transportation and did transport the same from Tacoma, Washington, to Phoenix, Arizona; that said shipment arrived in Phoenix, Arizona, on or about the 12th day of March, 1949, with all bracing torn loose and the plywood battered, split, broken and damaged; that the consignee of said shipment, J. D. Halstead of Phoenix, Arizona, refused to accept the same in said damaged condition and plaintiffs were required to and did, in mitigation of damages, cause the said plywood to be unloaded and sold in the open market for the best available price then and there obtaining; that the total net sum so received

for said damaged carload of plywood was the sum of \$3,905.41; that the total net sum plaintiffs would have received from said consignee but for the injury to said goods was the sum of \$5,083.22; that by reason of the foregoing, plaintiffs have suffered damage in the sum of \$1,177.81.

V.

That upon the date of arrival of said shipment at Phoenix, Arizona, as hereinabove pleaded, said damaged shipment was then and there thoroughly inspected by defendant's agents; that immediately thereafter and in the month of May, 1949, and again in June, 1949, plaintiff, Paul D. Mackie, discussed the matter of said damage in detail with one of defendant's then claim agents in Seattle, Mr. F. J. Taft; that by reason of said inspection and advice from its agents and from plaintiffs, defendant knew, immediately upon the arrival of said shipment, that it had damaged said shipment and said defendant then had at least as much, if not more, knowledge in relation to said damage than plaintiffs and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

VI.

That on the second day of February, 1950, plaintiffs filed written claim for said damages with defendant in Seattle, Washington; that said claim was by defendant on the 23rd day of February, 1950, and again on the 27th day of February, 1950, denied.

Wherefore, plaintiffs pray that they have judgment against the defendant in the sum of \$1,177.81, together with interest thereon at 6% per annum from and after the 12th day of March, 1949, until paid and for their costs and disbursements taxable herein.

RUMMENS, GRIFFIN & SHORT,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Paul D. Mackie, being first duly sworn, on oath deposes and says:

That he is one of the plaintiffs above-named; that he has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

/s/ PAUL D. MACKIE.

Subscribed and sworn to before me this 1st day of September, 1950.

/s/ KENNETH P. SHORT,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed September 5, 1950.

District Court of the United States for the Western
District of Washington, Northern Division
Civil Action File No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS,
d/b/a Mackie & Lewis,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant: Northern Pacific
Railway Company, a corporation.

You are hereby summoned and required to serve
upon Rummens, Griffin & Short, plaintiff's at-
torneys, whose address is 1107 American Building,
Seattle, Washington, an answer to the complaint
which is herewith served upon you within 20 days
after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment
by default will be taken against you for the relief
demanded in the complaint.

Dated: September 5, 1950.

[Seal] MILLARD P. THOMAS,
Clerk of Court.

By /s/ LOIS M. STOLSEN,
Deputy Clerk.

Return on Service of Writ attached.

Received September 5, 1950.

[Endorsed]: Filed September 7, 1950.

[Title of District Court and Cause.]

STIPULATION

Whereas the time to answer plaintiffs' complaint will expire on the 26th day of September, 1950;

Now, Therefore, It Is Hereby Stipulated by and between the parties hereto, by and through their respective attorneys of record, that the defendant may have to and including the 9th day of October, 1950, in which to file its answer.

Dated this 26th day of September, 1950.

/s/ KENNETH P. SHORT,
Of Attorneys for Plaintiffs.

/s/ ROSCOE KRIER,
Of Attorneys for Defendant.

[Endorsed]: Filed September 26, 1950.

[Title of District Court and Cause.]

ORDER GRANTING ADDITIONAL TIME TO ANSWER

Comes now on for hearing the stipulation of the above-named parties for an extension of time, and it appearing to the court that the time for the defendant to answer will expire on the 26th day of September, 1950, and that the parties have stipulated that the defendants may have to and including the 9th day of October, 1950, in which to file its answer;

Now, Therefore, good cause having been shown and the court being fully advised in the premises;

It Is Hereby Ordered that the defendant may have to and including the 9th day of October, 1950, to file its answer herein.

Done and Dated in Open Court this 26th day of September, 1950.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ROSCOE KRIER,
Of Attorneys for Defendant.

Approved by:

/s/ KENNETH P. SHORT,
Of Attorneys for Plaintiff.

[Endorsed]: Filed September 26, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiffs' complaint admit and denies as follows:

I.

The defendant admits the allegations contained in paragraph I of plaintiffs' complaint.

II.

The defendant admits the allegations contained

in paragraph II of plaintiffs' complaint, except it denies that it is a corporation organized under the laws of the State of Minnesota.

III.

The defendant admits the allegations contained in paragraph III of plaintiffs' complaint.

IV.

The defendant denies the allegations contained in paragraph IV of plaintiffs' complaint, except that it admits that on the 4th day of March, 1949, the Tacoma Plywood Corporation delivered to the defendant for shipment from Tacoma, Washington, to Phoenix, Arizona, one carload of Douglas Fir Plywood, that said shipment was transported from Tacoma, Washington, to Phoenix, Arizona, and that said shipment arrived at Phoenix, Arizona, on or about the 12th day of March, 1949. The defendant denies that the plaintiff has been damaged in the sum of \$1,177.81, or in any sum or amount whatsoever, as in said complaint alleged or otherwise.

V.

The defendant denies the allegations contained in paragraph V of plaintiffs' complaint except as may be hereinafter admitted.

VI.

The defendant admits the allegations contained in paragraph VI of plaintiff's complaint.

For a Further and Separate Answer and De-

fense to plaintiffs' complaint, the defendant alleges the following facts:

I.

That during all times herein and in said complaint mentioned, the Northern Pacific Railway Company was a railroad corporation engaged in the business of a common carrier by railroad both interstate and intrastate commerce in the State of Washington and other States, and subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

II.

That during the times herein and in said complaint mentioned, the Southern Pacific Company was a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States of Oregon, California and Arizona, and other States, and connects with the defendant herein.

That at said times said Southern Pacific Company and the defendant formed a through connecting line of common carrier railroad in interstate commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

III.

That on or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of ply-

wood to be transported by it and the said Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

IV.

That said shipment was so delivered to and received by the defendant herein for such transportation under and pursuant to a written contract and agreement then and there made and entered into by and between said shipper and the said defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation, and in consideration of the payment by said shipper of the lawful tariff charges therefor.

V.

That said bill of lading or contract of carriage provided, among other things:

Sec. 2 (b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claim-

ant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.”

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 14th day of March, 1949.

VI.

That the plaintiffs above-named altogether failed and neglected to file their claim in writing in accordance with Section 2(b) of said bill of lading and contract of carriage, as above quoted and set forth, until the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said plywood.

Wherefore the defendant, having fully answered plaintiffs' complaint, demands that the same be dismissed and that the defendant be allowed to go hence with its costs and disbursements incurred and expended herein.

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 9, 1950.

[Title of District Court & Cause.]

REPLY

Comes now plaintiffs and for Reply to the Affirmative Defense of the defendants, admit, deny and allege as follows:

I.

As to Paragraphs I and II of said Affirmative Defense, plaintiffs admit the same.

II.

As to Paragraph III thereof, plaintiffs deny the same except those portions thereof as are pleaded in plaintiffs' Complaint.

III.

As to Paragraph IV, plaintiffs admit that said shipment was delivered to defendant under and pursuant to a written contract and agreement then and there made and entered into by and between the shipper and defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation, and deny each and every other allegation therein contained.

IV.

As to Paragraph V, plaintiffs admit the first sentence of said Paragraph in its entirety, admit that the plywood therein described was delivered to the consignee on the 14th day of March, 1949, and denies each and every other allegation therein contained.

V.

As to Paragraph VI, plaintiffs admit that they filed a claim in writing on the 2nd day of February, 1950, with the defendant at which time more than nine months had expired since the delivery of said plywood and deny each and every other allegation therein contained.

Wherefore, having fully replied, plaintiffs pray that they have judgment in accordance with the demand of their complaint.

/s/ RUMMENS, GRIFFIN &
SHORT,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed October 13, 1950.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled action having come on regularly for a pre-trial conference at Seattle, Washington, on the 17th day of May, 1951, before the undersigned Judge of the above-entitled court, and both parties appearing by their respective attorneys of record, and after hearing statements of counsel and being fully advised in the premises, the following pre-trial order was settled:

Admitted Facts

(1) Plaintiffs, Paul D. Mackie and Joseph H. Lewis, at all times herein mentioned were residents of the State of Washington and co-partners doing business as Mackie & Lewis, with their principal office and place of business in Seattle, Washington.

(2) The defendant, Northern Pacific Railway Company, was at all times herein mentioned a corporation organized and existing under the laws of the State of Wisconsin, and engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the State of Washington and other States, subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

(3) The above-entitled court has jurisdiction of the parties and subject matter of this cause pursuant to Part I of the Interstate Commerce Act as amended (49 U.S.C.A., Section 1 et seq.).

(4) The Southern Pacific Company was at all times herein mentioned a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States of Oregon, California and Arizona, and other States, and connects with the defendant herein, and that the said Southern Pacific Company's rails and the defendant's rails formed a through connecting line of common carrier railroad in interstate

commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

(5) On or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of plywood to be transported by it and the said Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

(6) Said shipment was delivered to and received by the defendant herein for transportation under and pursuant to a written contract made and entered into by and between said shipper and the defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation.

(7) Said bill of lading or contract of carriage provided, among other things:

“Sec. 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from

the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 12th day of March, 1949.

(8) Said bill of lading, above described, has been assigned by the said Tacoma Plywood Corporation to the plaintiffs herein, and that the plaintiffs are now the lawful holders thereof.

(9) That on the date of arrival of said shipment at Phoenix, Arizona, an employe of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,

"Extent of damage not known. Consignee will call for final inspection."

and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employes of the Southern Pacific Company.

(10) That when said shipment arrived at point of destination, the bracing was broken and the load shifted from both ends toward the middle.

(11) That the said consignee, J. D. Halstead, refused to accept said shipment, and the plaintiffs herein, through their agents, disposed of the plywood contained in said shipment to their best advantage, and that said plaintiffs suffered a net loss of \$1,-177.71, including special damages.

(12) The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed by inability to complete a deal and determine the exact loss.

(13) Plaintiffs above named filed a written claim for their damage with the defendant, in Seattle, Washington, on the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said shipment of plywood as aforesaid, and that said claim was denied by the defendant on the 23rd day of February, 1950.

Plaintiffs' Contentions of Fact

That by reason of the inspection by the Southern Pacific Company and advice from the defendant's agents and from the plaintiffs, the defendant knew

immediately after the arrival of the shipment above described that it had damaged said shipment, and the defendant then had as much, if not more, knowledge in relation to said damage as the plaintiffs, and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

Defendant's Contention of Fact

At no time before the plaintiffs filed their claim on February 2, 1950, did the defendant or its connecting carrier know the extent of the damage to plaintiffs' shipment, if any.

Plaintiffs' Contentions of Law

By reason of the foregoing, Section 2(b) of the bill of lading and contract of carriage has been complied with by the plaintiffs. Under the foregoing circumstances it was not necessary for the plaintiffs to file a formal written claim.

Defendant's Contentions of Law

(1) The failure of a shipper to file a written claim for damage to his shipment within the time prescribed by the contract is a violation thereof.

(2) A shipper's oral notice to the carrier that he intends to file a claim of loss is not compliance with the terms of the contract.

(3) Under the Interstate Commerce Act the parties may not waive or ignore a valid provision of the contract under which the shipment was made.

Exhibits

The following exhibits were offered and identified by both parties:

(1) Copy of the bill of lading and contract of carriage under which the herein described shipment moved. It is stipulated between the parties that this copy may be substituted for the original.

(2) Inspection report dated 3/12/49, signed by W. G. Howell, an employe of the Southern Pacific Company, with typewritten copy attached.

(3) A letter dated February 2, 1950, signed Mackie & Lewis by P. D. Mackie, addressed to J. T. Horsley, Freight Claim Agent, Northern Pacific Railway Company. (All the attachments referred to in this letter, except copy of railroad inspectors report (Exhibit 2) refer to damages and are therefore not now material.)

(4) Letter dated February 23, 1950, signed by J. T. Horsley, Western Freight Claim Agent, Northern Pacific Railway Company, addressed to Mackie & Lewis.

(5) Letter dated February 24, 1950, signed by Mackie & Lewis by P. D. Mackie, addressed to J. T. Horsley, W.F.C.A., Northern Pacific Railway Company.

(6) Letter dated February 27, 1950, signed by J. T. Horsley, Western Freight Claim Agent, Northern Pacific Railway Company, addressed to Mackie & Lewis.

Action by the Court

The foregoing pre-trial order was approved by the parties, as evidenced by the signature of their counsel hereon, and this order is hereby entered as a result of which the pleadings pass out of the case. This pre-trial order shall not be amended except by agreement of the parties or to prevent manifest injustice.

Done in Open Court this 17th day of May, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved as to form:

RUMMENS, GRIFFIN &
SHORT,

By /s/ KENNETH P. SHORT,
Attorneys for Plaintiffs.

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,
Attorneys for Defendant.

SOUTHERN PACIFIC LINES **INSPECTION OF DAMAGED FREIGHT**

OS&D #

7340 #

Station Phoenix Date 3/12 1949

Document Received SP Inspector Called _____ Date Inspected _____

Date	W. B. No.	Car No.	Last Waybilling Point*	Destination	F. B. No.
		65624			

*See back of this form for definition.

Commodity Tacoma Plywood Consignee J D Halstead

Invoice Date _____ Case No. _____ Delay Order No. _____

Discounts _____ Drayman _____

Other References _____

Condition of Containers on Delivery _____

NOTE: Complete Prior Transportation Reference is Required on Concealed Loss or Damage Claims. See explanation on back of this form. Inspector shall request Consignee to complete and sign back of this form on any damaged articles not packed at "last way billing point."

Where Packed?

PRIOR—TRANSPORTATION REFERENCE

Date	W. B. No.	Car No.	From	To	Complete Route and Junctions
			Car door inspn		

No.	ARTICLES	Invoice	Price	Amount of Claim
	C/L Plywood			
	5 stacks crosswise of car			
	in end separated by bulkheads			
	made of 2" x 6" lbr. All			
	bracing broken & load badly			
	shifted both ends to middle -			
	Extent of dmg not known - C/e			
	will call for final inspn			

Show Disposition of Salvage _____

SRO #

This report is merely a statement of facts and not an acknowledgment of carrier's liability. Claims for loss and damage must be made in writing to the carrier at point of delivery, or at point of origin, within nine months after delivery of the property, or in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed.

S/ W G Howell

Notice to Claimants:

Inspector

In event claim is made for this damage attach this report thereto. See back of this form for information required in Support of Concealed Loss and Damage Claims" and questions to be answered by claimant.

(Over)

EXHIBIT 3

Mackie & Lewis
Domestic—Export
Forest Products
American Building
Seattle 4, U.S.A.

February 2, 1950.

J. T. Horsley, Freight Claim Agent,
Northern Pacific Railway Company,
Smith Tower,
Seattle 4, Washington.

Dear Sir:

We wish to file our claim for loss due to damage to plywood shipped in car SP 65624 from Tacoma to Phoenix, Arizona, on March 3, 1949, as follows:

This car was originally billed out to our customer at \$5350.76 as per copy of original invoice attached. This was subject to a 5% commission, so the net amount of the invoice was \$5083.22. The net amount of return on this shipment is \$3905.41 as per statements attached.

You will note in the final settlement of December 12th that we did not allow all of the deductions claimed in H. A. White's letter of May 21st, 1949, and that the net amount on our settlement of December 12th, which in addition to amounts shown in this letter of May 21st also includes \$364.97, which was an agreed settlement of stock left on hand as of that date is \$3031.51. This plus \$873.90 from Cluer totals \$3905.41, or the net amount received from

plywood on this car. This makes a loss on the shipment due to railroad errors of \$1178.81.

This shipment left Tacoma in good condition, well braced, and in proper shape to be shipped. It arrived in Phoenix with all bracing torn loose and with the plywood all battered and mixed in the car. As a result the customers to which it was shipped refused to accept and it was necessary to unload and resell. The above loss was incurred. We claim said amount from you.

Papers attached to prove claim:

Copy of Freight Bill.

Copy of original invoice.

Copy of letter of May 21st, 1949 (H. A. White).

Copy of invoice of Nov. 7th, 1949 (Walter Cluer).

Copy of final settlement December 12, 1949 (H. A. White).

Four pictures of car and plywood at time of arrival.

Copy of railroad inspectors report at time of arrival.

Please let us have your check to cover.

Yours very truly,

MACKIE & LEWIS,

/s/ P. D. MACKIE.

PDM/tl

Received February 3, 1950.

EXHIBIT 4

Northern Pacific Railway Company
Freight Claim Office
1020 Smith Tower
Seattle 4, Wash.

February 23, 1950.

In Your Reply Please Quote
Claim 389370 Desk 4
Mackie & Lewis,
American Building,
Seattle 4, Washington.

Attention: Mr. P. D. Mackie

Gentlemen:

I have reference to your claim of February 2, 1950, which you filed with our company for the sum of \$1,178.81 and in connection with alleged damage to plywood from car SP 65624.

The above car arrived Phoenix, Arizona, March 14, 1949, and so delivered to J. D. Halstead. Undoubtedly you are familiar with the fact that contract terms and conditions, uniform bill of lading, Section 2, Paragraph B provide that claims for loss and/or damage must be filed with carrier nine months after date of delivery of shipment in question. It was not until February 3, 1950, that we received your claim here in this office, nearly three months after the nine months' filing period had expired.

I have contacted the Southern Pacific agent at Phoenix with the thought in mind that consignee

might possibly have submitted to the Southern Pacific a notice of intention that a formal claim would be filed at a later date. Unfortunately, such is not the case and I, therefore, have no alternative but to respectfully decline your claim and return all supporting papers.

Yours truly,

/s/ J. T. HORSLEY,

Western Freight Claim Agent.

WJG:jg

Papers attached

EXHIBIT 5

Mackie & Lewis
Domestic—Export
Forest Products
American Building
Seattle 4, U.S.A.

February 24, 1950.

J. T. Horsley, W.F.C.A.,
Northern Pacific Railway Company,
1020 Smith Tower,
Seattle 4, Washington,

Dear Sir:

We cannot accept your refusal to consider our claim, your number 389370, on the technical ground that it was not filed within a time limit.

This claim was discussed both over the phone and in person with Mr. Taft, who was in your department until he was retired late last year. We advised

him of our intention to file such a claim and advised that formal claim was delayed by inability to complete the deal and determine exact loss. At no time in these conversations were we advised of any time limit or of any necessity for making our notice a written one, nor did we read the fine print on the back of the bill of lading.

We believe that this constitutes proper notice and that our claim should be considered on its merits. As a matter of fact, the filing of this claim was made as soon as possible after the actual loss was determined, and the claim should be considered on its merits under any conditions. This is obviously a loss occasioned by railroad failure, and should be compensated.

We are returning the papers attached and ask that you mail us your check to cover.

Yours very truly,

MACKIE & LEWIS,

By /s/ P. D. MACKIE.

PDM/tl

Received February 27, 1950.

EXHIBIT 6

Northern Pacific Railway Company
Freight Claim Office
1020 Smith Tower
Seattle 4, Wash.

February 27, 1950.

In Your Reply Please Quote
Claim 389370 Desk 4
Mackie & Lewis,
American Building,
Seattle 4, Washington.

Attention: Mr. P. D. Mackie

Gentlemen:

I have your letter of February 24th regarding the claim involving car SP 65624.

The writer has discussed this matter with Mr. Taft, who does recall talking to you in person about a carload of plywood that arrived destination in a damaged condition. This discussion being some time ago Mr. Taft, of course, could not recall all the details, but regardless of any verbal conversations between yourself and a representative of our company, the terms and conditions of uniform bill of lading (section 2, paragraph B) definitely state that claim must be filed with carrier in writing within nine months after date of delivery. Numerous legal decisions also have consistently held that a verbal notification is not sufficient to stay the statute of limitations.

It is indeed unfortunate that this situation has

come about, as your claim appears to be one of merit, but if we were to waive the statute of limitations in the instant case, we would be subject to penalization by the Interstate Commerce Commission and the participating carriers involved would not accept our debit in the final prorating of claim. In view of the above, I have no alternative but to again respectfully decline your claim and return herewith all papers.

Yours truly,

/s/ J. T. HORSLEY,

Western Freight Claim Agent.

WJG:jg

Papers attached.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

ORDER

Judgment will be for the plaintiffs as prayed for. Counsel for plaintiffs will prepare and submit proposed findings of fact, conclusions of law and judgment.

Dated May 23, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed May 23, 1951.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
JUDGMENT

Whereas by previous order made and entered herein the Court directed that judgment will be for the plaintiff and that counsel for the plaintiff will prepare and submit proposed Findings of Fact, Conclusions of Law and Judgment; and

Whereas counsel for the plaintiff has complied with said order and served his proposed Findings of Fact, Conclusions of Law and Judgment upon counsel for defendant;

Therefore, comes now the defendant and objects to the entry of said proposed Findings of Fact and Conclusions of Law and the Judgment based thereon, and particularly objects:

(1) To the entry of paragraph XIV of the proposed Findings of Fact, for the reason that it is not a justified conclusion to be drawn from the stipulated facts.

(2) To the entry of paragraph II of the Conclusions of Law, for the reason that on the basis of the files and records in this cause, the plaintiff is not entitled to judgment against the defendant in the sum of \$1,177.71 or in any amount whatsoever.

(3) To the allowance of interest on the sum of \$1,177.71 from the 12th day of March, 1949, for the reason that this cause is based on an unliquidated claim.

(4) To the entry of judgment in this cause, based on the said proposed Findings of Fact and Conclusions of Law, for the reasons hereinabove stated.

Dated at Seattle, Washington, June 1, 1951.

Respectfully submitted,

/s/ ROSCOE KRIER,

Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on duly and regularly for trial before the Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, sitting in the above-entitled court by designation, on the 22nd day of May, 1951, plaintiffs appearing by and through their counsel, Rummens, Griffin & Short and the defendant appearing by and through its counsel, Dean H. Eastman and Roscoe Krier and no testimony having been taken on said hearing but the court having read and considered the Pre-trial Order heretofore entered herein by this court on the 17th day of May, 1951, and having examined and considered the Exhibits attached thereto, and being fully advised in the premises, this court does make the following:

Findings of Fact

I.

Plaintiffs, Paul D. Mackie and Joseph H. Lewis, at all times herein mentioned were residents of the State of Washington and co-partners doing business as Mackie & Lewis, with their principal office and place of business in Seattle, Washington.

II.

The defendant, Northern Pacific Railway Company, was at all times herein mentioned a corporation organized and existing under the laws of the State of Washington, and engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the State of Washington and other States, subject to Part I of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (United States Code Annotated, Title 49, Chapters 1 and 2) and acts amendatory thereof and supplemental thereto.

III.

The above-entitled court has jurisdiction of the parties and subject matter of this cause pursuant to Part I of the Interstate Commerce Act as amended (49 U.S.C.A., Section 1, et seq.).

IV.

The Southern Pacific Company was at all times herein mentioned a railroad corporation engaged in the business of a common carrier by railroad in both interstate and intrastate commerce in the States

of Oregon, California and Arizona, and other States, and connects with the defendant herein, and that the Southern Pacific Company's rails and the defendant's rails formed a through connecting line of common carrier railroad in interstate commerce between the city of Tacoma in the State of Washington and the city of Phoenix in the State of Arizona.

V.

On or about the 4th day of March, 1949, the Tacoma Plywood Corporation, as shipper, delivered to the defendant herein one carload of plywood to be transported by it and the Southern Pacific Company, as connecting carrier, to the city of Phoenix, Arizona, and there delivered to the consignee, one J. D. Halstead.

VI.

Said shipment was delivered to and received by the defendant herein for transportation under and pursuant to a written contract made and entered into by and between said shipper and the defendant, as provided and authorized by law and the lawful tariffs then in effect and applicable to such interstate transportation.

VII.

Said bill of lading or contract of carriage provided, among other things:

"Sec. 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the

loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in the case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

That the plywood hereinabove described was delivered to the consignee in accordance with the terms of the above-mentioned contract and bill of lading on the 12th day of March, 1949.

VIII.

Said bill of lading, above described, has been assigned by the said Tacoma Plywood Corporation to the plaintiffs herein, and that the plaintiffs are now the lawful holders thereof.

IX.

That on the date of arrival of said shipment at Phoenix, Arizona, an employee of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the

results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,

“Extent of damage not known. Consignee will call for final inspection.”

and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employees of the Southern Pacific Company.

X.

That when said shipment arrived at point of destination, the bracing was broken and the load shifted from both ends toward the middle.

XI.

That the said consignee, J. D. Halstead, refused to accept said shipment, and the plaintiffs herein, through their agents, disposed of the plywood contained in said shipment to their best advantage, and that said plaintiffs suffered a net loss of \$1,177.71, including special damages.

XII.

The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed

by inability to complete a deal and determine the exact loss.

XIII.

Plaintiffs above named filed a written claim for their damage with the defendant, in Seattle, Washington, on the 2nd day of February, 1950, at which time more than nine months had expired since the delivery of said shipment of plywood as aforesaid, and that said claim was denied by the defendant on the 23rd day of February, 1950.

XIV.

That by reason of the inspection by the Southern Pacific Company and advice from the defendant's agents and from the plaintiffs, the defendant knew immediately after the arrival of the shipment above described that it had damaged said shipment, and the defendant then had as much, if not more, knowledge in relation to said damage as the plaintiffs, and at all times herein mentioned had or was chargeable with actual knowledge of all the conditions as to said damage.

Done in Open Court this ... day of,
1951.

.....,

Judge.

From the foregoing Findings of Fact the court does deduce the following:

CONCLUSIONS OF LAW

I.

That this court is possessed of jurisdiction of the parties and subject matter of this action.

II.

That plaintiffs are entitled to judgment against the defendant in the sum of Eleven Hundred Seventy-seven and 71/100 Dollars (\$7,177.71) together with their costs and disbursements taxable herein.

Done in Open Court this ... day of, 1951.

/s/ DAL M. LEMMON,
Judge.

Presented by:

/s/ KENNETH P. SHORT,
RUMMENS, GRIFFIN &
SHORT,
Attorneys for Plaintiffs.

Approved as to form:

DEAN H. EASTMAN, and
ROSCOE KRIER,

By,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1951.

United States District Court, Western District of
Washington, Northern Division

No. 2617

PAUL D. MACKIE and JOSEPH H. LEWIS
d/b/a Mackie & Lewis,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on duly and regularly for trial before the Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, sitting in the above-entitled court by designation on the 22nd day of May, 1951, plaintiffs appearing by and through their counsel, Rummens, Griffin & Short and the defendant appearing by and through its counsel, Dean H. Eastman and Roscoe Krier, and the court having examined and considered the Pre-trial Order heretofore entered herein on the 17th day of May, 1951, together with Exhibits attached thereto, and having heard the arguments of respective counsel and having heretofore rendered, made and entered its findings of fact and conclusions of law, now therefore, in conformity therewith, it is by the court,

Ordered, Adjudged and Decreed that plaintiffs be and they hereby are awarded judgment against the defendant in the sum of Eleven Hundred

Seventy-seven dollars and 71/100 (\$1,177.71) and for their costs and disbursements taxable herein.

Done in Open Court this 1st day of June, 1951.

/s/ DAL M. LEMMON,
Judge.

Presented by:

/s/ KENNETH P. SHORT.

Approved by:

DEAN H. EASTMAN, and
ROSCOE KRIER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 1, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on June 1, 1951.

Dated this 21st day of June, 1951.

/s/ DEAN H. EASTMAN,
/s/ ROSCOE KRIER,

Attorneys for Appellant, Northern Pacific Railway Company.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND
ON APPEAL

Know All Men by These Presents:

That we, the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, as principal, and the Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Paul D. Mackie and Joseph H. Lewis, d/b/a Mackie & Lewis, the plaintiffs above named, in the just and full sum of Twenty-Six Hundred and No/100ths Dollars (\$2,600.00), for which sum well and truly to be paid we bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas the above-named plaintiffs on the 1st day of June, 1951, in the above-entitled action and court, recovered judgment against the defendant in the sum of \$1,177.71, together with their costs and disbursements taxable herein, and

Whereas the above-named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said United States District Court.

Now, Therefore, if the principal, Northern Pacific Railway Company, shall pay to Paul D. Mackie and Joseph H. Lewis, d/b/a Mackie & Lewis, the plaintiffs above named, all costs and damages that may be awarded against the said principal on appeal or dismissal thereof, and shall satisfy the judgment appealed from in full, together with costs and interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof we have hereunto subscribed our names and affixed our seals this 21st day of June, 1951.

NORTHERN PACIFIC ..
RAILWAY COMPANY.

By /s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY COM-
PANY OF SAINT PAUL

[Seal] By /s/ JAMES P. YOUNG,
Attorney in Fact.

Approved this 22nd day of June, 1951.

/s/ JOHN C. BOWEN,

District Judge.

Approved 6-21-51.

/s/ KENNETH P. SHORT,

Attorney for Plaintiffs.

[Endorsed]: Filed June 22, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant submits the following points upon which it will rely:

(1) The failure of the shipper to file a written claim for damages to his shipment within the time prescribed by the contract of carriage (bill of lading), is such a violation of the contract as to constitute a waiver of the claim;

(2) A shipper's oral notice to the carrier that he intends to file a claim for damage to his goods in transit is not compliance with the contract, which requires the filing of a claim in writing;

(3) Knowledge of damage to goods in transit on the part of a carrier's agent does not excuse a failure to comply with the provision of the contract requiring filing of claim in writing;

(4) A carrier may not waive or ignore a valid

provision of the contract under which the shipment was made.

Respectfully submitted,

/s/ DEAN H. EASTMAN,

/s/ ROSCOE KRIER,

Attorneys for Defendant
and Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties herein, by and through their respective attorneys of record, that the record on appeal may include the following:

- (1) Pre-trial Order, together with the six exhibits thereto attached;
- (2) Order announcing the Court's opinion;
- (3) Objections to proposed Findings of Fact and Conclusions of Law;
- (4) Findings of Fact and Conclusions of Law;
- (5) Judgment;
- (6) Notice of Appeal;

(7) Statement of Points.

Dated this 10th day of July, 1951.

/s/ ROSCOE KRIER,
Attorney for Defendant
and Appellant.

/s/ RUMMENS, GRIFFIN and
SHORT,
Attorney for Plaintiffs and
Respondents.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said Cause. The papers herewith transmitted constitute the record on appeal from the final judgment filed in said

cause for Plaintiff on June 1, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Sept. 5, 1950.
2. Marshal's Return on Summons, filed Sept. 7, 1950.
3. Stipulation extending time to Oct. 9, 1950, to answer, filed Sept. 26, 1950.
4. Order Granting Additional Time to Answer, filed Sept. 26, 1950.
5. Answer, filed Oct. 9, 1950.
6. Reply, filed Oct. 13, 1950.
7. Pre-Trial Order, filed May 17, 1951.
8. Plaintiffs' Trial Memorandum, filed May 18, 1951.
9. Defendant's Trial Brief, filed May 18, 1951.
10. Order ruling judgment for Plaintiffs, filed May 23, 1951.
11. Objections of defendant to Proposed Findings of Fact, Conclusions of Law and Judgment, filed June 1, 1951.
12. Findings of Fact and Conclusions of Law, filed June 1, 1951.
13. Judgment for Plaintiffs, filed June 1, 1951.
14. Notice of Appeal by defendant, filed June 21, 1951.
15. Supersedeas and Cost Bond on Appeal, filed June 22, 1951 (\$2600.00), (Saint Paul-Mercury Indemnity Company of St. Paul).

16. Statement of Points by defendant-appellant, filed July 11, 1951.

17. Stipulation Designating Record on Appeal, filed July 11, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 26th day of July, 1951.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13032. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Paul D. Mackie, and Joseph H. Lewis, d/b/a Mackie & Lewis, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 30, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.